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IN THE

Supreme Court of the United States
OCTOBER TERM, 1948

No. 266

CENTRAL-ILLINOIS SECURITIES CORPORATION and
CHRISTIAN A. JOHNSON

v.

SECURITIES AND EXCHANGE COMMISSION,
THOMAS W. STREETER, et al.,
THE HOME INSURANCE Co., et al.

No. 226

SECURITIES AND EXCHANGE COMMISSION

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, et al.

On Petitions for Writs of Certiorari to the United States
Court of Appeals for the Third Circuit

**REPLY MEMORANDUM FOR CENTRAL-ILLINOIS
SECURITIES CORPORATION AND CHRISTIAN
A. JOHNSON**

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The Memorandum for the Securities and Exchange Commission dated October, 1948, does not oppose the granting

of our cross-petition, but takes issue with various contentions set forth therein and in our brief in opposition in Nos. 226, 227, and 243. We address ourselves briefly to certain of the Commission's arguments.

1. The Commission's Memorandum does not deny, nor could it, that the Commission's determination of the "value" of the Engineers' preferreds was based upon market prices and preferred stock yields as of the period March-May, 1946. It also concedes, as it must, an "admitted change" in market conditions since that time (Commission Memo., p. 6). But it characterizes as a "gross exaggeration" our statements that the Engineers' preferreds if still outstanding would have a present market value of not more than \$90-\$95 per share. It then goes on to state that the computations of the authors of the Memorandum "show an average yield at the present time of 4.82% for the securities used by Badger as a basis of his comparisons and now outstanding", as compared with the 4.6% yield estimated by Badger and accepted by the Commission. It is thus suggested that the total increase which has taken place in the yields of preferred stocks comparable with those of Engineers is somewhat less than 5%,¹ and that the Engineers' preferreds would therefore still have a market value in excess of \$100 per share.

The utter incredibility of this contention is easily demonstrated. It will be noted that no documentation whatever is offered in support of these alleged "computations". In contrast, the authoritative data on which we relied for our statements as to the present value of the Engineers' preferreds is presented in clear and full detail (R. 122-3). The figures therein set forth are not subject to hypothesis or argument, for they are of such irrefutable and official char-

¹ An increase from the yield of 4.6% used by Badger to the 4.82% yield now suggested in the Commission's memorandum would represent an increase of approximately 4.8%.

acter that courts will unhesitatingly make them the subject of judicial notice.² The Federal Reserve Bulletin is used to establish the changes in public utility common stock prices and in bond yields, and Standard & Poor's "Trade & Securities Manual" the changes in preferred stock yields. These authorities attest that yields of "high grade" preferred stocks had increased from an average of 3.42% as of the period of Badger's testimony, to 4.12% as of the period of our petition for reargument in the Circuit Court, or an increase of approximately 21% (R. 122). This increase applied to the 4.6% yield basis claimed by Badger for the Engineers' preferreds, incontrovertibly establishes a 5.56% yield basis *at best* for the Engineers' preferreds and thus a market value of less than \$100 per share (R. 122).³

The Commission's Memorandum (note 2, p. 7) points out that these figures are as of March, 1948, as though to suggest that they are not valid at the present time. In fact, the latest figures are even more conclusive. Standard & Poor's "Trade & Securities Manual" for September, 1948, shows that "high grade" preferred stock yields further increased from 4.12% as of March to 4.20% as of September, 1948.⁴ Thus, the increase of 21% as of March has now increased to 22.8%, establishing a current yield basis for the Engineers' preferreds of not less than 5.65% as compared

² See, for example, the extent to which this Court relied upon similar official sources in *Insurance Group v. The Denver & Rio Grande W. R. Co.*, 329 U. S. 607, 616-619.

³ Since the weighted average of the dividend rate on all three series of the Engineers' preferreds was slightly under 5.40% (R. 122), a yield basis in excess thereof would necessarily mean that the stocks would have a current market value of less than \$100 per share. Badger had predicated his conclusion, which the Commission adopted, that the Engineers' preferreds had a value of more than \$100 per share upon his opinion that they would sell on a yield basis of *less than* 5.40% (viz., 4.6%) if the Act had not required their retirement.

⁴ Standard & Poor's Trade & Securities, Current Statistics Section, September, 1948, p. 27.

with the 5.56% for the earlier month. Moreover, since the Engineers' preferreds were not "high grade" preferreds but at very best "medium grade", as the Commission's Memorandum concedes (p. 6), it is axiomatic that the extent of the increase in their case must be even greater.⁵ Yet, in the face of these facts, Commission Counsel in their Memorandum offer the Court the bald assertion that their own undisclosed "computations" show an increase of *less than 5%* from the 4.6% yield basis assumed by Badger and the Commission.⁶

2. We submit that these contentions of Commission Counsel serve only to strengthen our argument that review of these causes by this Court at the present time is not appropriate,⁷ when important factual questions remain to be determined which may well (and we assert assuredly *will*) render the legal issues wholly academic. Commission Counsel argue in reply that their own computations establish to *their* satisfaction that the case has not yet become academic. But a factual question of this importance is not one which at this stage should turn upon bare assertions of Counsel. If the change in the value of the Engineers' preferreds is in fact less than 5% as Commission

⁵ Cf. District Court Finding No. 52 (314a): "The increase in yields on low to medium grade preferreds must necessarily be even greater than the increase on high grade preferreds and high grade bonds."

⁶ Not only did Badger repeatedly and emphatically affirm the *permanence* for future years of these "values" which he attributed to the Engineers' preferreds and of the then current money rates on which they were predicated (R. 2066a, 1019a, 1085a), but the *only* possibility of change, which he envisaged was the possibility of the money rates and yields going *even lower* (R. 1085a-1086a). Similarly, in adopting Badger's conclusions, the Commission neither envisaged nor allowed for the possibility of any increase whatever in money rates or preferred stock yields over those current at the time of Badger's testimony.

⁷ See pages 3-7 of our brief in opposition in Nos. 226, 227 and 243.

Counsel contend rather than upwards of 20% as we have urged on the basis of official records, the Court is entitled to a determination by the Commission to that effect before embarking upon the task of reviewing extensive legal issues which authoritative figures strongly indicate have become devoid of all significance. Unsupported assertions by Counsel are scarcely an adequate substitute for the expert finding which the Commission itself is entitled to make only on the record after notice and hearing.⁸

This is particularly true in the light of the crucial bearing of the changed values which are here being disputed upon the Commission's entire case. For these changes do not go to factors which are merely tangential to the legal issues involved in this case, and which may appropriately be determined subsequent to the Court's decision on the legal issues. These values go to the *very heart of the Commission's case*, and are wholly apart from the basic fallacies in the Commission's entire *rationale* pointed out by the Courts below. If we, rather than Commission Counsel, are correct in our version of the changes, the Commission's "investment value ex the Act" doctrine is stone dead of natural causes; *and this Court in now undertaking to pass upon the legal validity of that doctrine will be performing merely a post-mortem autopsy.*

3. Although the Commission argued before the District Court and the Circuit Court that there was no necessity for a remand to the Commission, Commission Counsel now assert that "we see no escape from the requirement of a remand to the Commission" (Commission Memo., p. 4). If that contention is valid, it renders denial of the petitions

⁸ As we have previously pointed out (p. 5, note 4 of our brief in opposition in Nos. 226, 227, 243), the Commission itself has already formally found in another case, after consideration of the record, that preferred stock "investment values" determined as of precisely the same period as the determination of those of Engineers, have subsequently been *substantially adversely affected*.

for the writ at the present time *all the more appropriate*, in order to permit determination of the factual questions which will definitively establish that the legal issues are moot. Cf. *Republic Natural Gas Co. v. State of Oklahoma*, 334 U. S. 62.

Dated, October 11, 1948.

—Respectfully submitted,

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